No. 09-963

In the Supreme Court of the United States

PETRO LUGOVYJ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner was ineligible for withholding of removal under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 8-13) and the immigration judge (Pet. App. 14-40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2009. The petition for a writ of certiorari was filed on February 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that an alien may not be removed from the United States to a particular country "if the Attorney General decides that the alien's

life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3).

b. "The burden of proof is on the applicant for withholding of removal" to establish eligibility for relief. 8 C.F.R. 208.16(b), 1208.16(b).[1] An applicant can meet his burden in one of two ways. First, an applicant's demonstration that he has "suffered past persecution in the proposed country of removal on account of" an enumerated ground creates a rebuttable presumption that he would face future persecution if returned to that country. 8 C.F.R. 208.16(b)(1)(i), 1208.16(b)(1)(i). Second, an applicant who has not suffered past persecution can offer other evidence "that it is more likely than not that he * * * would be persecuted on account of" an enumerated ground if he were removed to a particular country. 8 C.F.R. 208.16(b)(2), 1208.16(b)(2). The Board of Immigration Appeals (BIA or Board) has construed the term "persecution" to be limited to "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control." *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

c. The INA does not define "particular social group." In a precedential decision issued in 1985, the BIA described that phrase as referring to a "group of persons all of whom share a common, immutable characteristic"

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[1] This requirement is now codified at 8 U.S.C. 1231(b)(3)(C), which was added to the INA by Section 101(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 303-304. That provision is not applicable to this case, however, because petitioner filed his application for withholding of removal before the effective date of the REAL ID Act. Compare Pet. App. 16 n.1 (application filed on Oct. 29, 2004), with REAL ID Act § 101(h)(2), 119 Stat. 305 (effective date of May 11, 2005).

that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

Between 1985 and 1997, the Board's decisions identified four "particular social groups": persons identified as homosexuals by the Cuban government;[2] members of the Marehan subclan of the Darood clan in Somalia;[3] "young women of the Tchamba-Kunsuntu Tribe [of northern Togo] who have not had [female genital mutilation (FGM)], as practiced by that tribe, and who oppose the practice";[4] and Filipinos of mixed Filipino and Chinese ancestry.[5] Several of these decisions relied not only on an immutable/fundamental group characteristic, but also on the recognizability of the group in the pertinent society. See *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997); *In re H-*, 21 I. & N. Dec. 337, 342-343 (B.I.A. 1996).

Between 2006 and 2008, in response to the evolving nature of claims and developing case law in the courts of appeals, the BIA issued four precedential decisions that were designed to provide "greater specificity" in defining the phrase "particular social group." *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).[6] Those decisions

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[2] *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 821-823 (B.I.A. 1990).

[3] *In re H-*, 21 I. & N. Dec. 337, 342-343 (B.I.A. 1996).

[4] *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

[5] *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

[6] On December 7, 2000, the former Immigration and Naturalization Service issued a proposed rule that would have provided guidance regarding the definitions of "persecution" and "membership in a

restated the immutable/fundamental characteristic requirement. See *In re A-M-E-*, 24 I. & N. Dec. 69, 73-74 (B.I.A.), aff'd *sub nom. Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70 (2d Cir. 2007); *In re C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A.), aff'd *sub nom. Castillo-Arias* v. *United States Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007). They also "reaffirmed" (*In re A-M-E-*, 24 I. & N. Dec. at 74) that, consistent with the Board's previous decisions, a qualifying social group must possess a recognized level of "social visibility," which describes "the extent to which members of a society perceive those with the characteristic in question as a member of a social group." *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008). The Board also referred to guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), which discuss the "visibility" of a proposed group and whether the group is perceived as such by the pertinent society. *In re C-A-*, 23 I. & N. Dec. at 956, 960.

The Board's recent decisions also state that the analysis of "particular social group" claims involves consideration of whether the group in question is defined with sufficient "particularity." *In re A-M-E-*, 24 I. & N. Dec. at 74, 76; *In re C-A-*, 23 I. & N. Dec. at 957. The proposed group cannot be too "amorphous" or "indeterminate" or be defined by a characteristic "too subjective, inchoate, and variable to provide the sole basis for membership." *In re A-M-E-*, 24 I. & N. Dec. at 76. The Board also stated that it will consider whether the proposed group "share[s] a common characteristic other than their risk of being persecuted," or instead is "de-

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particular social group." 65 Fed. Reg. 76,588. That proposed rule has been neither withdrawn nor finalized during the subsequent nine years.

fined *exclusively* by the fact that [the group] is targeted for persecution." *In re C-A-*, 23 I. & N. Dec. at 956, 960 (citation omitted); see *id.* at 957 (finding group of "non-criminal informants" "too loosely defined to meet the requirement of particularity").

2. Petitioner is a native and citizen of Ukraine who entered the United States without authorization in 1999. In 2003, the Department of Homeland Security (DHS) commenced removal proceedings. Petitioner admitted the factual allegations against him, and an immigration judge (IJ) found that he was removable from the United States. Petitioner sought withholding of removal. Pet. App. 14-15 & n.1.[7]

3. After a hearing, the IJ denied petitioner's request for withholding of removal and ordered him removed to Ukraine. Pet. App. 14-38. The IJ had "concerns regarding the lack of immediately and readily available corroborating evidence," and she found that petitioner had "embellish[ed] his claim" in certain respects. *Id.* at 26-27. The IJ concluded, however, that "the crux of [petitioner's] testimony was consistent with what is in his written application" and stated that she would "deem [petitioner] credible." *Id.* at 27.

The IJ nevertheless identified two reasons why petitioner was ineligible for withholding of removal. First,

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[7] Petitioner conceded that he was ineligible to apply for asylum because he did not seek that form of relief within one year of his arrival in the United States. Pet. App. 15; see 8 U.S.C. 1158(a)(2)(B). In addition to withholding of removal, petitioner also sought protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess (1988), 1465 U.N.T.S. 85. See Pet. App. 10. That latter request for relief, however, is not before this Court. See Pet. i n.1.

the IJ found that petitioner failed to establish that any past harm he suffered "was on account of or ha[d] a nexus to a statutorily enumerated or protected ground." Pet. App. 28. The IJ observed "that the single alleged act of mistreatment perpetrated upon" petitioner was done by people who petitioner described as "mafia or thugs." *Id.* at 27. The IJ further noted that petitioner stated "that these thugs demanded protection money from all business owners or other business owners in the area," and that they had stolen money from petitioner during "the November 1998 attack" that petitioner described in his testimony. *Id.* at 29. The IJ thus concluded that petitioner had been the victim of "criminal extortion" and "[r]obbery," and she found "absolutely no record evidence that [the] unknown individuals [who attacked petitioner] were targeting [him] on the basis of any statutorily enumerated or protected ground." *Id.* at 29, 31.

Second, the IJ concluded that petitioner had not suffered "persecution" because the harm in question was not inflicted by the government or its agents and petitioner "failed to establish that the government of the Ukraine was unwilling or unable to protect him." Pet. App. 32. The IJ noted that petitioner reported the November 1998 attack to the police, who told him "that they would try to deal with or handle the matter." *Ibid.* The IJ further noted, however, that petitioner chose not "to submit a written statement or report" as requested by the police because "*[petitioner]* made the decision that it was too early to submit such statements." *Id.* at 32-33.

4. Petitioner appealed to the BIA, which dismissed his appeal in a non-precedential, single-member order. Pet. App. 8-13. The Board stated that it "adopt[ed] and

affirm[ed]" the IJ's decision, but it also made certain "additions" in response to arguments raised by petitioner on appeal. *Id.* at 8.

The Board gave three reasons for rejecting petitioner's assertion that he had suffered persecution "on account of his membership in a particular social group" consisting of "persons refusing to give in to demands of criminal gangs [operating] with impunity because of the actions of corrupt government officials." Pet. App. 9 (internal quotation marks omitted). First, the Board concluded that petitioner's proposed group failed to satisfy "the requisite standards of 'social visibility' explained in some of * * * [the Board's] recent decisions." *Ibid.*; see pp. 3-4, *supra*. Second, the Board emphasized that petitioner "does not really know who harmed him," Pet. App. 9, and it stated that "criminal extortion efforts do not constitute persecution on account of a protected ground where there is no indication that the perpetrators had any interest in [an applicant for withholding of removal] beyond his identity as a business owner who had money," *id.* at 10.

Third, the Board found "no indication that the persons who demanded money from [petitioner] or the persons who harmed [him] were operating with impunity because of the actions of corrupt government officials." Pet. App. 10. The BIA noted that petitioner "admitted that he did not know of any specific connection between the criminals and the Ukranian government," and it stated that petitioner's "conjecture * * * that a connection may have existed does not sufficiently evidence such a connection." *Ibid.* The Board also stated that "[t]he fact that there is background evidence which indicates that some government officials in the Ukraine are corrupt[] does not result in a finding that any of those

officials were involved in this particular case." *Id.* at 10-11.

5. Petitioner filed a petition for judicial review of the BIA's order, which the court of appeals denied in an unpublished decision. Pet. App. 1-7. The court observed that petitioner had not "draw[n] our attention to any evidence that was overlooked by the [IJ] and the Board," *id.* at 4, and the court agreed with the IJ and the Board that petitioner failed to produce "*evidence* linking the harm suffered by petitioner to a protected ground and to government complicity," *id.* at 5.

The court of appeals also stated that it was "unpersua[ded]" by petitioner's assertion that his "mere defiance of unidentified thugs' extortion demands renders him a member of a protected social group." Pet. App. 5. The court explained that such a proposed group "is not based on any cognizable immutable characteristic" and "is impermissibly circular" because the members of a qualifying "particular social group" "must share a narrowing characteristic other than their risk of being persecuted." *Id.* at 6 (quoting *Rreshpja* v. *Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)).

Judge Merritt filed a brief concurring opinion. Pet. App. 6-7. He explained that "the refusal of a business man to pay protection money to private individuals who violate local criminal law is not a basis for withholding of removal." *Id.* at 6. Judge Merritt further explained that the record contained no "basis for finding that government officials were in fact implicated in the harm," and he noted that "[p]etitioner's brother had been appointed as a police officer which, at least on the surface, demonstrates a lack of government hostility." *Id.* at 6-7. Judge Merritt also noted that "[t]here are many places in the United States where citizens are not safe from

harm from criminal activity," and he stated that if an alien could avoid removal based on "private threats, probably every country in the world would qualify as a place from which we should withhold removal." *Id.* at 7.

ARGUMENT

1. Petitioner's principal arguments (Pet. 5-12) involve the proper manner of determining whether an asserted set of people constitute a "particular social group" for purposes of the statutes governing asylum and withholding of removal. Those claims do not warrant further review.

a. This case would be an unsuitable vehicle for addressing any issues about the proper manner for determining any questions about the meaning of "particular social group" because the unpublished decision below also rests on two other independent and case-specific grounds. Accordingly, resolution of the social group question is not necessary to the proper resolution of petitioner's application for withholding of removal.

Simply being a member of a "particular social group" does not make a person eligible for withholding of removal. Instead, an applicant *also* must demonstrate that he has suffered past "persecution" or is likely to suffer future persecution *and* that such persecution was or would be "on account of" his membership in the social group. 8 C.F.R. 208.16(b)(1) and (2); 1208.16(b)(1) and (2). The court of appeals correctly held that petitioner did not satisfy either of those additional requirements.

First, as the IJ, the BIA, and the court of appeals all concluded, petitioner failed to demonstrate that any harm he suffered was "because of" (8 U.S.C. 1231(b)(3)) or "motiv[ated by]" (*INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992)) his membership in his proposed social

group. To the contrary, as the BIA explained, the record contains no evidence that the people who attacked petitioner "were motivated by anything other than financial gain." Pet. App. 9; accord *id.* at 4-5 (court of appeals); *id.* at 27-31 (IJ). Although petitioner disagrees with that holding, see Pet. 13-14, this factbound issue does not warrant this Court's review, see pp. 13-14, *infra*.

Second, petitioner also failed to demonstrate that any harm he suffered constituted "persecution." As the IJ explained, an act does not constitute "persecution" unless either it was perpetrated by the government or its agents or the applicant "establish[es] that the government is unwilling or unable to protect him." Pet. App. 32 (citing *In re Pierre*, 15 I. & N. Dec. 461 (B.I.A. 1975)). As the IJ, the BIA, and the court of appeals all concluded, petitioner "failed to establish that the government of the Ukraine was unwilling or unable to protect him." *Ibid.*; accord *id.* at 5 (court of appeals); *id.* at 10-11 (BIA). That factbound issue does not warrant this Court's review.

b. Even if the determination of whether petitioner is a member of a "particular social group" were necessary to the proper disposition of his application for withholding of removal (and in this case it is not), petitioner's claims still would not merit this Court's review.

i. The BIA has long been of the view—and recently reaffirmed—that whether a proposed group qualifies as a "particular social group" must "be determined on a case-by-case basis." *In re C-A-*, 23 I. & N. Dec. 951, 955 (B.I.A. 2006) (quoting *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)). Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (stating that "[t]here is obviously some ambiguity in a term like 'well-founded fear,'"

which is used in the statutes governing asylum, "which can only be given concrete meaning through a process of case-by-case adjudication"). Petitioner identifies no court of appeals that has held that "persons [who] refus[e] to 'give in to demands of criminal gangs [operating] with impunity because of the actions of corrupt government officials'" constitute a "particular social group." Pet. App. 9 (third brackets in original). There is thus no conflict among the lower courts with respect to the specific question presented in this case.

ii. Petitioner suggests that, in determining whether a "particular social group" exists, some lower courts have impermissibly treated "social visibility as a requirement rather than a relevant factor." Pet. 5 (emphasis omitted); see Pet. 5-10; see pp. 3-5, *supra* (describing the BIA's precedential decisions regarding "social visibility"). Even if that were true, however, this case would present no opportunity for this Court to consider the issue, because the court of appeals' unpublished decision in this case contains no discussion of the "social visibility" of petitioner's proposed group. See Pet. App. 1-7; see *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (stating that this Court "ordinarily 'do[es] not decide in the first instance issues not decided below'" (citation omitted)). For the same reason, this case also presents no occasion for this Court to consider (see Pet. 7-8) whether "social visibility" may be considered at all in determining whether an applicant for withholding of removal has carried his burden of demonstrating membership in a particular social group. See Br. in Opp. at 10-14, *Contreras-Martinez* v. *Holder*, No. 09-830 (filed Apr. 14, 2010) (describing cases in the lower courts with respect to that issue).

iii. Petitioner also asserts that the lower courts have been "inconsistent[]" in applying the principle that members of a "particular social group" "must share a characteristic other than the risk of persecution." Pet. 10 (emphasis omitted). Petitioner does not contend, however, that the court of appeals' unpublished decision in this case conflicts with any specific decision of another court of appeals with respect to this point.[8] Instead, petitioner suggests that "*[i]f* the scenario" considered by a 15-year-old Eighth Circuit decision "was altered slightly" to more closely resemble this case, *then* the Eighth Circuit would "*most likely* find that [the modified group] constitutes a social group." Pet. 11-12 (emphasis added). That kind of speculation is plainly insufficient to demonstrate the existence of a conflict in the lower courts that would warrant this Court's review.

Petitioner also criticizes the court of appeals for "fail[ing] to consider [his proposed] group in the context of country conditions." Pet. 10. But the court's decision expressly refers to "State Department reports of general conditions in Ukraine." Pet. App. 4-5; see *id.* at 10-11 (BIA describing "background evidence which indicates that some government officials in the Ukraine are corrupt"). In addition, the court of appeals distinguished a 2007 Ninth Circuit decision that held that a Ukrainian businessman was eligible for both asylum and

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[8] Petitioner does assert (see Pet. 11) that the decision of the court of appeals conflicts with its own previous decision in *Al-Ghorbani* v. *Holder*, 585 F.3d 980 (6th Cir. 2009). The court of appeals perceived no such conflict, and an intracircuit conflict would not warrant this Court's review in any event. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

withholding of removal, reasoning that that case involved a situation in which the alien suffered "retaliation * * * for acting against government corruption." *Id.* at 5 (discussing *Fedunyak* v. *Gonzales*, 477 F.3d 1126 (2007)). Here, in contrast, the court of appeals explained that "there is no evidence of governmental involvement in the extortion or the ensuing beating and robbery. Nor is there evidence that petitioner engaged in such political activity as opposing or criticizing the government's participation in or failure to stop the extortion scheme." *Ibid.* The decision of the court of appeals thus flowed from a close consideration of the particular facts of petitioner's case rather a failure to consider its broader context.

2. Petitioner also briefly argues (Pet. 13-14) that the court of appeals erroneously required him to present "direct evidence" that the people who attacked him did so because of his membership in a particular social group. The court of appeals did not say, however, that petitioner was required to present "direct evidence." Thus, although petitioner is correct that this Court's decision in *Elias-Zacarias* states that an applicant is not required "to provide direct proof of his persecutors' motives," 502 U.S. at 483, there is no conflict between that statement and the court of appeals' decision in this case.

In addition, contrary to petitioner's assertion, the court of appeals did "provid[e] an explanation of why" the "reports and news articles about country conditions * * * were not sufficient" to demonstrate eligibility for withholding of removal. Pet. 13. As petitioner acknowledges, the court of appeals stated that "what remain[ed] lacking" was "*evidence* linking the harm suffered by petitioner to a protected ground." Pet. App. 5; see *id.* at 9 (BIA observing that petitioner "does not really know

who harmed him, nor is there any indication that their actions were motivated by anything other than financial gain"). Petitioner may disagree with whether the court of appeals was correct with respect to that case-specific assessment. That sort of factbound issue, however, does not warrant this Court's review.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

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[9] Petitioner also asserts that the court of appeals' decision conflicts with its own previous decision in *Mostafa* v *Ashcroft*, 395 F.3d 622 (6th Cir. 2005), which petitioner describes as having held that reports about "general political conditions in a country are admissible at a" removal hearing. Pet. 13. In this case, however, the court of appeals did not refuse to consider the State Department reports of general conditions in Ukraine; it merely held that those reports were insufficient to demonstrate a link between the harms petitioner suffered and his membership in a particular social group. Pet. App. 4-5. In any event, an intracircuit conflict would not warrant this Court's review. See *Wisniewski*, 353 U.S. at 902 (per curiam).